GRANTED

(7)

OCT 3 1 2003

No. 02-6320

IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
NOAH A. LEVINE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE OFFICERS VIOLATED THE SIXTH AMENDMENT WHEN THEY DELIBERATELY ELICITED A POST-INDICTMENT INCULPATORY STATEMENT FROM PETITIONER IN THE ABSENCE OF COUNSEL. 1

II. THE TRADITIONAL DERIVATIVE-EVIDENCE RULE—NOT THE RULE OF *OREGON* V. *ELSTAD*—GOVERNS THIS CASE. 4

A. This Court Has Consistently Held That Fruits Of Evidence Obtained Through Unconstitutional Out-Of-Court Conduct Must Be Suppressed. 5

B. The Rationale Of *Elstad* Is Limited To The Fifth Amendment Context. 9

C. No Other Reason Justifies Admission Of A Subsequent Confession Upon Proof Of A *Miranda* Waiver Alone. 14

III. THE GOVERNMENT CANNOT SUSTAIN ITS BURDEN TO PROVE ATTENUATION OF THE TAINT. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Arizona v. *Roberson*, 486 U.S. 675 (1988) 17
Brown v. *Illinois*, 422 U.S. 590 (1975) ..... *passim*
Chavez v. *Martinez*, 123 S. Ct. 1994 (2003) 4, 6, 8
Darwin v. *Connecticut*, 391 U.S. 346 (1968) 11
Dickerson v. *United States*, 530 U.S. 428 (2000) 8, 16
Dunaway v. *New York*, 442 U.S. 200 (1979) 11, 13, 18
Harrison v. *United States*, 392 U.S. 219 (1968) 13
Kastigar v. *United States*, 406 U.S. 441 (1972) 4, 6, 15
Kaupp v. *Texas*, 123 S. Ct. 1843 (2003) 14, 19
Kuhlmann v. *Wilson*, 477 U.S. 436 (1986) 1, 2
Maine v. *Moulton*, 474 U.S. 159 (1985) 1, 8, 10, 11, 17
Massiah v. *United States*, 377 U.S. 201 (1964) 1, 18
McNeil v. *Wisconsin*, 501 U.S. 171 (1991) 10
Miller v. *Fenton*, 474 U.S. 104 (1985) 2
Miranda v. *Arizona*, 384 U.S. 436 (1966) 1
Missouri v. *Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. denied*, 123 S. Ct. 2091 (2003) (No. 02-1371) 12
Murphy v. *Waterfront Commission*, 378 U.S. 52 (1964) 6, 15
Nix v. *Williams*, 467 U.S. 431 (1984) 4, 7, 15, 17
Oregon v. *Elstad*, 470 U.S. 298 (1985) ..... *passim*
Patterson v. *Illinois*, 487 U.S. 285 (1988) 9, 16
Rawlings v. *Kentucky*, 448 U.S. 98 (1980) 19
Strickland v. *Washington*, 466 U.S. 668 (1984) 18
Taylor v. *Alabama*, 457 U.S. 687 (1982) 18, 19
Texas v. *Cobb*, 532 U.S. 162 (2001) 8, 17
Thompson v. *Keohane*, 516 U.S. 99 (1995) 2
United States v. *Ash*, 413 U.S. 300 (1973) 10
United States v. *Bayer*, 331 U.S. 532 (1947) 11, 13, 14
United States v. *Henry*, 447 U.S. 264 (1980) 1
United States v. *Hubbell*, 530 U.S. 27 (2000) 6
United States v. *Morrison*, 449 U.S. 361 (1981) 8
United States v. *Wade*, 388 U.S. 218 (1967) 4, 7, 15
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 7, 8
Wong Sun v. *United States*, 371 U.S. 471 (1963) 4, 15

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

Page(s)

42 U.S.C. § 1983 7
Fed. R. Crim. P. 4(c)(3)(A) 3

OTHER AUTHORITIES

The American Heritage Dictionary of the English Language (4th ed. 2000) 3
Crawford, Kimberly A., *Intentional Violations of Miranda: A Strategy for Liability*, Law Enforcement Bull. (Aug. 1997), *available at* http://www.fbi.gov/publications/leb/1997/aug976.htm 12

This case is about the *Sixth* Amendment. At issue is whether agents of the state may ferret out inculpatory information from a defendant in a criminal case at a time when he is entitled to the advice of a lawyer in his dealings with the prosecution, and what they may then do once they obtain that information. At stake is the fairness of the adversary system of justice, which the Constitution safeguards by securing to each accused the right to the assistance of counsel. Although the inculpatory information was unlawfully obtained in this case by the police while petitioner was in custody, this is not a *Miranda* case, and the issues do not turn on any claim of coercion or compelled self-incrimination. Notwithstanding the government's attempts to elide the distinction between *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Massiah* v. *United States*, 377 U.S. 201 (1964), the Constitution's guarantee of the assistance of counsel for those who have been formally accused of a crime does not reside in the Fifth Amendment, or even the Fifth and a Half Amendment. It resides in the Sixth Amendment.

I. THE OFFICERS VIOLATED THE SIXTH AMENDMENT WHEN THEY DELIBERATELY ELICITED A POST-INDICTMENT INCULPATORY STATEMENT FROM PETITIONER IN THE ABSENCE OF COUNSEL.

"[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985). Under this standard, the crucial question is whether the officers "deliberately elicited" an inculpatory statement from petitioner when they arrived at his home, after he was indicted, and told him that they wanted to "discuss" the charges against him. *Massiah*, 377 U.S. at 206. State officers "deliberately elicit" statements from defendants when they "intentionally creat[e] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *United States* v. *Henry*, 447 U.S. 264, 274 (1980); *see also Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986) ("action, beyond merely

listening, that [is] designed deliberately to elicit incriminating remarks").

The findings of fact made by the magistrate judge and adopted by the district court make clear that the arresting officers did deliberately elicit an incriminating response from petitioner at his home. The magistrate judge specifically found that Deputy Bliemeister's conduct was "designed to elicit a response." J.A. 103. The magistrate thus declined to credit Bliemeister's testimony that he did not expect petitioner to respond to his invitation to "discuss" the charges (J.A. 56) and concluded instead, "I don't know how [Bliemeister's statement] could be anything except designed to elicit a response." J.A. 103; *see also* J.A. 103-04 ("I cannot believe that [the] mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find."). Having witnessed the officers' live testimony, the magistrate was uniquely well-positioned to make this determination, and his findings are entitled to deference on appeal. *See Miller* v. *Fenton*, 474 U.S. 104, 114 (1985) ("When ... the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight."); *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995) (same).

The record amply supports the magistrate's finding that Bliemeister's actions were designed to elicit an incriminating response. Bliemeister told petitioner that the purpose of the officers' visit was "to discuss" petitioner's alleged involvement in methamphetamine use and distribution—a clear invitation to petitioner to talk to the officers about those subjects. The government strives to argue that, "[t]aken in context, the record indicates that Bliemeister merely used colloquial language to inform petitioner that he wished to tell petitioner about the charges that he faced," and that "[t]he officers' conduct was ... inconsistent with any effort to elicit incriminating statements." Gov't Br. 18-19. This rationalization cannot be squared with the facts.

First, the officers' own testimony contradicts the government's claim that Bliemeister used the term "discuss" to signify only that he intended to *explain* the charges in the indictment *to* petitioner, without expecting any response. On cross-examination, Bliemeister admitted that "the first thing [he] told [petitioner] was that [he] needed *to discuss with* [petitioner] his involvement in the use and distribution of methamphetamine." J.A. 45 (emphasis added). Detective Garnett similarly confirmed that Bliemeister used "[w]ords to [the] effect" that the officers "were there *to discuss with* [petitioner] his involvement in the use and distribution of methamphetamine." J.A. 83 (emphasis added). The magistrate judge thus found that Bliemeister told petitioner "that the purpose of [the officers'] visit was *to discuss with* [petitioner] his role in methamphetamine use and distribution." J.A. 102 (emphasis added); *see* J.A. 103 (describing Bliemeister's statement as "we need *to talk with you* ... or we want *to talk with you* about your involvement in methamphetamine distribution or use" (emphasis added)). Although the government seizes on secondary definitions of the word "discuss" to offer an alternative interpretation in hindsight, the record makes clear that Bliemeister used the term "discuss" in its conventional sense: to engage in a conversation, not to give a lecture. *See The American Heritage Dictionary of the English Language* 517 (4th ed. 2000) ("1. To speak with another or others about; talk over."); Gov't Br. 18 (citing similar primary definition).

Although the government attempts to portray Bliemeister's "discuss" statement as a routine explanation of charges required by the Federal Rules of Criminal Procedure (Br. 15), the officers admitted they were not trained to preface an arrest with such a statement. *See* J.A. 56, 85-86. If the officers had shared the government's understanding of their conduct as routine behavior required by federal law, one would expect them to have testified that they were trained to inform defendants of the need to "discuss" pending charges when making an arrest. *See* Fed. R. Crim. P. 4(c)(3)(A).

Moreover, Bliemeister had used similar language in a prior encounter with petitioner when it was also clear that he was conducting an investigation, not reciting allegations. In March 1999, Bliemeister and another officer went to petitioner's home to conduct an investigative technique described as a "knock and talk." J.A. 20. During that earlier encounter, the officers informed petitioner of accusations they had received from an unknown caller concerning petitioner and told him that they "wanted to discuss these allegations with him." J.A. 44; *see also* J.A. 19-20, 42-44. Given the similarity of the 1999 and 2000 confrontations and of the language employed on each occasion, the most natural conclusion is that the officers had the same investigative purpose in proposing "to discuss" relevant criminal allegations with petitioner in both instances. Aware that petitioner had previously responded to police entreaties to "discuss" allegations of criminal activity, Bliemeister relied on the likelihood that the same form of inquiry would succeed the following year with petitioner. But on the second occasion, petitioner was a party to a criminal case and thus entitled under the Sixth Amendment to the assistance of counsel at any such discussions—a right the officers did not honor.

II. THE TRADITIONAL DERIVATIVE-EVIDENCE RULE—NOT THE RULE OF *OREGON* v. *ELSTAD*—GOVERNS THIS CASE.

This Court has consistently ruled that evidence obtained directly through unconstitutional conduct, along with all evidence derived therefrom, must be excluded from a defendant's criminal trial.[1] In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court ruled that, when the only police misconduct present is an inadvertent failure to give the full warnings

[1] *See Wong Sun* v. *United States*, 371 U.S. 471, 484-85 (1963) (Fourth Amendment); *Brown* v. *Illinois*, 422 U.S. 590, 597-600 (1975) (same); *Kastigar* v. *United States*, 406 U.S. 441, 453-54, 461-62 (1972) (Fifth Amendment); *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2001-02 (2003) (plurality opinion) (same); *United States* v. *Wade*, 388 U.S. 218, 239-41 (1967) (Sixth Amendment); *Nix* v. *Williams*, 467 U.S. 431, 441-43 (1984) (same).

required by *Miranda*, derivative evidence in the form of a subsequent confession by the defendant may be admitted so long as that confession has been preceded by *Miranda* warnings and has been knowingly and voluntarily made. *See id.* at 309. *Elstad*, however, has no application to this case, because the evidence at issue here was derived from state conduct that violated the Sixth Amendment.

A. This Court Has Consistently Held That Fruits Of Evidence Obtained Through Unconstitutional Out-Of-Court Conduct Must Be Suppressed.

At the time of the *Elstad* decision, this Court had already held the derivative-evidence rule applicable in Fourth, Fifth, and Sixth Amendment cases. *See supra*, p. 4 n.1. In *Elstad*, the Court declined to extend the full scope of the derivative-evidence rule to cases involving only a *Miranda* violation. *See* 470 U.S. at 306-09. The Court based its decision squarely on the distinction between a "*Miranda* violation" resulting from a failure to give the required warnings and a "Fifth Amendment violation" involving actual coercion of a confession from a suspect. *Id.* at 306. Absent an "actual infringement of the suspect's constitutional rights," the Court found no basis for application of "the doctrine . . . that fruits of a constitutional violation must be suppressed." *Id.* at 308; *see also id.* at 309 ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").

The government now apparently seeks to revise the rationale of *Elstad*, and intimates (without expressly arguing) that the Court declined to apply the derivative-evidence rule in that case because no constitutional violation was complete until the defendant was brought to trial. The government then draws an analogy to the Sixth Amendment context by arguing that a Sixth Amendment violation is not established until the government introduces *at trial* evidence deliberately elicited from a criminal defendant lacking the assis-

tance of counsel. *See* Gov't Br. 25-30. But the timing of the "completion" of the violation was not the basis of the Court's decision in *Elstad*. Indeed, the Court stated that the traditional derivative-evidence rule would have applied had it been shown that the police officers coerced the defendant's first confession. *See* 470 U.S. at 306-09; *see also Chavez* v. *Martinez*, 123 S. Ct. 1994, 2002 (2003) (plurality opinion).

Nor has the Court ever suggested that the extent to which derivative evidence must be excluded from a defendant's trial turns on whether the relevant constitutional violation is considered complete prior to trial. The Court recently confirmed that a violation of the Self-Incrimination Clause is not complete until trial, *see Chavez*, 123 S. Ct. at 2001, 2004 (plurality opinion); *id.* at 2006 (Souter, J.), yet also made clear that, whether or not a compelled statement is ultimately admitted at trial, the Constitution requires the exclusion of all evidence *derived from* that statement. *See id.* at 2001-02; *see also United States* v. *Hubbell*, 530 U.S. 27, 37 (2000). The Court's immunity cases similarly hold that the evidentiary consequences of compelled self-incrimination can be determined prior to trial and that, under the Fifth Amendment, *neither* testimony that was compelled from a witness under a grant of immunity *nor* any evidence derived from that testimony may be used in any way against the immunized witness. *See, e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 453-54, 457-59 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

This Court has analyzed derivative-evidence questions in a similar way under the Sixth Amendment's Counsel Clause. The Court has never held that the extent to which derivative evidence must be excluded from a defendant's trial turns on whether a violation of the Counsel Clause is considered complete prior to trial. Rather, the Court has applied (and presumed the application of) the derivative-evidence rule even when the evidence in question derived from a *pretrial*, out-of-court encounter with a defendant.

For example, in *United States* v. *Wade*, 388 U.S. 218, 239-41 (1967), where government officers conducted a pre-

trial lineup with the indicted defendant outside the presence of counsel, the Court held that the admissibility of a subsequent courtroom identification must be analyzed under the derivative-evidence rule. Similarly, in *Nix* v. *Williams*, 467 U.S. 431 (1984), where officers deliberately elicited an out-of-court statement from the arraigned defendant outside the presence of counsel, the Court explained that the traditional derivative-evidence rule applied to "violations ... of the Sixth Amendment as well as of the Fifth Amendment" (*id.* at 442 (citation omitted)), and determined the admissibility of the derivative physical evidence at issue under the inevitable-discovery exception to the derivative-evidence rule. *See id.* at 443-50. Thus, the Court's cases make clear that the constitutionally proscribed means of obtaining evidence for use against a defendant (e.g., a lineup or deliberate elicitation of an incriminating statement outside the presence of counsel) carries with it a derivative-evidence exclusionary rule. The government's arguments about when a Sixth Amendment violation is complete are wide of the mark.[2]

---

[2] In any event, the government errs in contending (Br. 25) that this Court has held that a Sixth Amendment violation does not occur unless the evidence obtained in an uncounseled encounter "is used against the defendant at trial." The government relies principally on *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), but that case held only that no claim under 42 U.S.C. § 1983 would lie based solely on the fact that an undercover agent had participated in discussions between a defendant and his attorney. The Court did *not* suggest that the Sixth Amendment would have been violated only if the undercover agent had testified at trial. In fact, the Court stated:

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554; *see also United States* v. *Morrison*, 449 U.S. 361, 364-65 (1981).

In *Elstad*, the Court distinguished between a confession obtained in violation of *Miranda* and a coerced confession obtained in violation of the Constitution. In the former case, the confession is suppressed not because its admission *necessarily* would violate the Fifth Amendment, but as a constitutional prophylaxis because courts cannot reliably distinguish between voluntary and involuntary confessions obtained by police during custodial interrogation. *See Elstad*, 470 U.S. at 306-07; *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). In the case of a coerced confession, the defendant's statement must be suppressed because its admission at trial *necessarily* would violate the Fifth Amendment. *See Elstad*, 470 U.S. at 306-07; *Chavez*, 123 S. Ct. at 2002. For the *Elstad* Court, the applicability of the derivative-evidence rule turned on this distinction between the bases for exclusion. *See* 470 U.S. at 306-09.

Similarly, the exclusion of a statement that officers of the state deliberately elicit from an uncounseled defendant is mandated by the Constitution, not by a prophylactic rule that sweeps more broadly than the Sixth Amendment.[3] In this case, officers of the state deliberately elicited an uncounseled post-indictment statement from petitioner. Accordingly, the Sixth Amendment requires the exclusion of the statement obtained at petitioner's home, and the predicate for application of the derivative-evidence rule (a constitutional violation) has been established.

[3] Indeed, the Court has characterized the deliberate elicitation of inculpatory statements from an uncounseled defendant as a violation of the Sixth Amendment, just as it described coercion of a confession in *Elstad* as a violation of the Fifth Amendment. *Compare, e.g.*, *Texas* v. *Cobb*, 532 U.S. 162, 168-69 (2001) ("police had violated the suspect's Sixth Amendment right to counsel") *and Moulton*, 474 U.S. at 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.") *with Elstad*, 470 U.S. at 309 ("police infringement of the Fifth Amendment itself").

B. The Rationale Of *Elstad* Is Limited To The Fifth Amendment Context.

Elstad is distinguishable for a second reason: it addresses only what is necessary to ensure that a defendant's rights under the *Fifth* Amendment are not violated. The government has attempted to transmute this case into a Fifth Amendment dispute, repeatedly pleading the voluntariness of petitioner's intervening waiver and jailhouse confession as bases for applying *Elstad* here. This case, however, arises under the Sixth Amendment. The Court's identification of a rule in *Elstad* to "satisf[y]" "the Fifth Amendment proscription against use of compelled testimony" therefore does not govern here. 470 U.S. at 318. The admissibility of petitioner's jailhouse confession must instead be resolved by consideration of the "distinct policies and interests" underlying the Sixth Amendment. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975).

Relying on *Patterson* v. *Illinois*, 487 U.S. 285 (1988), the government argues that *Elstad*'s holding adequately serves the Sixth Amendment as well. Specifically, the government contends (Br. 23) that *Patterson* and *Elstad* together support the proposition that, notwithstanding the prior deliberate elicitation of a post-indictment statement in the absence of counsel, "[f]ollowing a defendant's voluntary, knowing, and intelligent waiver of counsel, his statements should be held admissible." The government overreads both decisions. The waiver at issue in *Patterson* was not preceded by government misconduct of any kind. *See* 487 U.S. at 287-89. The Court thus had no occasion to establish a standard for the admissibility of derivative evidence when government officers first deliberately and unconstitutionally elicit an uncounseled post-indictment statement.

Elstad does not fill the gap left in the government's *Patterson* argument. The Court did state in *Elstad* that the admissibility of the defendant's second confession in that case turned on whether the statement was preceded by proper *Miranda* warnings and "knowingly and voluntarily made." 470 U.S. at 309. But that holding applied only in the

specific context of that case, in which the officers' elicitation of the first confession amounted to merely a *Miranda* violation—and not, in the Court's words, a "police infringement of the Fifth Amendment itself." *Id.* The Court did not hold (as would be necessary to provide a successful parallel for the government's waiver argument here) that a *Miranda* waiver following closely in time upon an "infringement of the Fifth Amendment itself" would similarly suffice to render a subsequent confession admissible. In fact, the Court stated precisely the opposite in *Elstad*: if government officers coerce an initial confession from a defendant, the admissibility of a subsequent warned confession turns on the extent to which the Fifth Amendment taint from the prior coercion remains. *See id.* at 310.

When police officers elicit a voluntary confession from a suspect (even if they fail to comply in all respects with *Miranda*), the subsequent administration of *Miranda* warnings generally ensures that a confession given thereafter is voluntary, and thereby addresses the central concern of the Fifth Amendment. That is the basis of the *Elstad* decision. *See* 470 U.S. at 310-11. But voluntariness is not the focus of the Sixth Amendment's Counsel Clause, and transplantation of the limited *Elstad* rule into the Sixth Amendment context would undermine the distinct policies and interests underlying the Counsel Clause. The Counsel Clause is founded upon the Framers' recognition that "the average defendant does not have the professional legal skill to protect himself" in a criminal prosecution, when faced with the full array of resources available to the state. *Moulton*, 474 U.S. at 169 (internal quotation marks omitted). The primary purpose of the Counsel Clause is "to minimize imbalance in the adversary system" by providing "a spokesman for, or advisor to, the accused." *United States* v. *Ash*, 413 U.S. 300, 309, 312 (1973). The guarantee of counsel's assistance protects the accused from his own "lack of familiarity with the law." *Id.* at 317; *see also McNeil* v. *Wisconsin*, 501 U.S. 171, 177-78 (1991).

When police officers deliberately and successfully elicit a post-indictment confession from an uncounseled criminal defendant, subsequent *Miranda* warnings from the same police officers are insufficient by themselves to ensure that the central concerns of the Sixth Amendment are vindicated. The warnings do not afford the defendant "the professional legal skill" (*Moulton*, *supra*) necessary to understand the situation into which the government's misconduct has thrust him. They do not inform the defendant, as counsel would, of the legal rules surrounding the admissibility of the prior, deliberately elicited statement. Nor do the *Miranda* warnings provide the defendant the necessary legal advice regarding the true consequences of making an additional statement in these circumstances. There is accordingly a heightened danger that the defendant will decide to make a second statement based upon a lack of familiarity with his legal rights. In short, while the *Miranda* warnings may ensure the removal of any Fifth Amendment taint remaining from a prior *Miranda* violation, the warnings by themselves do little to alleviate the distinct Sixth Amendment taint from the elicitation of a prior uncounseled statement.

Relying on *Elstad*, the government denies (Br. 33-34) that an accused who has made an initial, uncounseled confession may be meaningfully influenced to make another confession by the (erroneous) belief that he has little to lose, and potentially much to gain, through further self-incrimination. But numerous decisions of this Court recognize that defendants' actions are influenced in exactly this way.[4] *Elstad* did not question these cases. *Elstad* did not hold (as the government seems to suggest) that, as a matter of law, a defendant's first confession never has a causal connection to his willingness to make a second confession. *Elstad* held only

---

[4] *See, e.g., Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979); *Brown*, 422 U.S. at 605 & n.12; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947); *cf. Darwin* v. *Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part, dissenting in part).

that this connection does not rise to the level of Fifth Amendment "compulsion." 470 U.S. at 314.[5]

The fact that a defendant who has made an inadmissible first confession is meaningfully influenced by his ignorance of his legal rights to make a second confession is, however, a Sixth Amendment concern. Once the government deliberately elicits a post-indictment statement from an uncounseled defendant, it should be precluded from using that statement thereafter to obtain an additional related confession until there is some assurance that the equality of the adversarial encounter has been restored and the defendant understands the consequences of further self-incrimination.

---

[5] As we acknowledged in our opening brief (at 24-25), *Elstad* did describe as "speculative and attenuated" the causal connection between *that defendant's* making of his first, unwarned confession and his ultimate decision to make a second warned statement. 470 U.S. at 313-14. But that statement was offered as support for the Court's ultimate ruling that "the mere fact that a suspect has made an unwarned admission does not warrant a *presumption of compulsion*," *id.* at 314 (emphasis added), and must be understood in that context. The Court did not purport to hold more broadly that a defendant's initial confession to the police can never influence his subsequent behavior in an encounter with the government, and had no reason to so hold. To do so now would ignore the teachings of law enforcement. Police interrogation manuals specifically counsel officers to press the psychological advantage gained once a suspect has given a confession. *See* Pet. Br. 21 (citing interrogation manual). In another case pending before the Court, *Missouri* v. *Seibert*, No. 02-1371, a police officer confirmed that institutes train officers to interrogate suspects in two stages—first, in the absence of counsel and without a warning of the right to counsel and then, once incriminating admissions have been obtained, a second time with the administration of proper *Miranda* warnings. *See Missouri* v. *Seibert*, 93 S.W.3d 700, 702-04 (Mo. 2002). An *amicus* brief submitted in *Seibert* by former prosecutors, judges and law enforcement officers explains (at 15-16) that the two-stage interrogation technique "is effective," and that "[e]veryone in law enforcement knows that the purpose of [it] is to soften up the suspect and increase the likelihood that she will not invoke her rights once warnings are belatedly given." FBI agents similarly have recognized the incentives for officers to engage in this tactic. *See* Kimberly A. Crawford, *Intentional Violations of Miranda: A Strategy for Liability*, Law Enforcement Bull. (Aug. 1997), *available at* http://www.fbi.gov/publications/leb/1997/aug976.htm.

To the extent there is any uncertainty regarding the cause of a second confession, the government, having "meddle[d]" with "[t]he springs of conduct" through its wrongful actions, bears the burden of demonstrating "that its illegal action did not induce" the subsequent confession. *Harrison* v. *United States*, 392 U.S. 219, 224-25 (1968).

The government incorrectly argues (Br. 35) that *Elstad* found the causal connection between the making of an initial inculpatory statement and a second such statement "too speculative to serve as the foundation for a finding that [the] second warned statement is the fruit of [the] first unwarned statement." The Court in *Elstad* addressed the defendant's challenge to the voluntariness of his second confession only *after* it decided that the "fruits of the poisonous tree" rule was not applicable. *Compare* 470 U.S. at 303-09 (applicability of fruits rule), *with id.* at 309-14 (voluntariness argument). Because the Court had already found the traditional "fruits" rule not to be applicable *at all*, it had no occasion to determine whether a warned statement could or could not be a "fruit" of a prior, unwarned statement.

Indeed, if *Elstad* had held that a warned confession could never be a "fruit" of a prior confession, the decision would have contradicted the Court's prior cases on the identical issue. For example, in *Brown*, the Court held that the defendant's second statement (which was preceded by *Miranda* warnings) "was clearly the result and the fruit of the first," reasoning that the defendant's belief in the admissibility of his first statement "bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." 422 U.S. at 605 & n.12. The Court later relied on this precise portion of its *Brown* decision, applying it to the same effect in *Dunaway* v. *New York*, 442 U.S. 200, 219 n.20 (1979). *United States* v. *Bayer*, 331 U.S. 532 (1947), also did not reject the possibility that a confession can be the "fruit" of a prior confession. To the contrary, *Bayer* expressly recognized that because of "the psychological and practical disadvantages of having confessed," a subsequent confession *can* be regarded as a "fruit"

of the first, but also held that the confessor is not "perpetually disable[d]" from making a usable confession. *Id.* at 540-41. Only after considering the specific facts of that case—including the lapse of six months between confessions and the administration of a *Miranda*-like warning—did the Court hold the second confession admissible. *See id.* at 541. In sum, *Elstad*, which was decided under the Fifth Amendment, provides no precedent for recognizing an exception to the traditional derivative-evidence rule in the Sixth Amendment context presented here.

C. No Other Reason Justifies Admission Of A Subsequent Confession Upon Proof Of A *Miranda* Waiver Alone.

1. The government further argues (Br. 36-43) that, even if petitioner's second confession is in fact the fruit of the initial Sixth Amendment violation, the admissibility of the second confession is nonetheless controlled by the *Elstad* rule—*viz.*, if the statement was preceded by *Miranda* warnings and was knowingly and voluntarily made, then it is admissible. This Court has never applied such a rigid rule in its derivative-evidence cases. The attenuation of the taint from a constitutional violation turns on all the surrounding circumstances, not an algorithm.

Thus, in a line of Fourth Amendment cases beginning with *Brown* v. *Illinois*, the Court has consistently held that "[t]he *Miranda* warnings, *alone* and *per se*, cannot always make the [decision to confess] sufficiently a product of free will to break . . . the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603; *see Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*) (same). Rather, the Court also has examined the temporal proximity of the unconstitutional conduct to the defendant's statement, the presence of intervening circumstances, and the purpose and flagrancy of the government's misconduct. *See Kaupp*, 123 S. Ct. at 1847; *Brown*, 422 U.S. at 603-04. In the Fifth Amendment context—indeed, in *Elstad* itself—the Court held that the admissibility of a confession following an earlier coerced confession depended upon a number of factors,

including "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators." 470 U.S. at 310.[6] And in the Sixth Amendment case of *Wade*, which concerned the admissibility of a courtroom identification that followed an earlier uncounseled lineup, the Court applied the derivative-evidence rule and articulated several factors for determining whether "the evidence . . . has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint," including "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, . . . and the lapse of time between the alleged act and the lineup identification." 388 U.S. at 241 (internal quotation marks omitted).

The government attempts to distinguish the *Brown* line of cases by arguing that a Fourth Amendment violation is completed at the time of the unreasonable search or seizure, and thus the *Miranda* warnings cannot "cure" a Fourth Amendment violation. *See* Gov't Br. 36-38. But there is no indication in those cases that the timing of a Fourth Amendment violation was at all relevant to their holdings. In addition, the Court has never found this distinction to justify limiting the Fourth Amendment derivative-evidence cases to their particular context. The Sixth Amendment decisions in *Wade* and *Nix* both relied on and applied *Wong Sun* v. *United States*, 371 U.S. 471 (1963). *See Nix*, 467 U.S. at 441-42; *Wade*, 388 U.S. at 241. And as we showed in our opening brief (pp. 18-19), the differences between the Fourth and Sixth Amendments justify, if anything, a more stringent derivative-evidence rule under the Sixth Amendment.

---

[6] When the government compels a person to testify under a grant of immunity, the Court has erected an even higher barrier to the admission of derivative evidence, requiring the government to "show[] that [its] evidence is not tainted by establishing that [it] had an independent, legitimate source for the disputed evidence." *Murphy*, 378 U.S. at 79 n.18; *see also Kastigar*, 406 U.S. at 460 (same).

2. The government also contends (Br. 40-43) that the costs of applying the traditional derivative-evidence rule in the Sixth Amendment context would outweigh its benefits. But precisely the opposite is true: application of the *Elstad* rule in place of the traditional derivative-evidence rule would significantly burden defendants' Sixth Amendment rights without yielding sufficient societal benefits in return.

As the Court has recognized in the Fourth Amendment context, a blanket rule that *Miranda* warnings are sufficient to break the link between unconstitutional conduct and a subsequent confession "eviscerate[s]" any incentive for government officers to avoid the improper conduct in the first instance, "making the warnings, in effect, a 'cure-all.' " *Brown*, 422 U.S. at 602. That conclusion is even more apt with respect to the Sixth Amendment. To admit a deliberately elicited, uncounseled, post-indictment statement against the defendant at trial in cases involving *no* preceding Sixth Amendment violation, the prosecution already must show that a defendant waived his right to counsel and made his statement voluntarily. *See, e.g., Patterson*, 487 U.S. at 292 (waiver); *Dickerson*, 530 U.S. at 434 (voluntariness). The government now advocates using exactly the same rule—proof of a waiver followed by a voluntary statement—to determine the admissibility of a confession derived from an earlier Sixth Amendment violation. In the government's view, nothing should be changed by the fact that it has violated the Constitution.

Because, under the government's submission, admissibility of a confession would be governed by the same rule in both instances, officers would have no incentive to observe the commands of the Sixth Amendment. They would, however, have a powerful incentive to meet with indicted defendants in the absence of counsel to "discuss" incriminating information with them. If the interview proves not to be useful, nothing is lost through the effort. But if the interview is fruitful, a simple administration of the *Miranda* warnings (which would have been required in any event had the officers simply obeyed the Constitution in the first instance) followed by a renewed discussion with the defendant of the useful incriminating statements (and potentially more) would secure the admissibility of the evidence for trial. That is, of course, precisely what occurred in this case.

The government incorrectly asserts (Br. 41) that "deterrence has only an attenuated role to play in this context." Not only has this Court never suggested that the deterrence rationale for the derivative-evidence rule is inapplicable in the Sixth Amendment context, but, in fact, it has recognized that deterrence is highly pertinent. In *Nix*, 467 U.S. at 442-43, after noting that it had held the derivative-evidence rule applicable in Sixth Amendment cases, the Court explained that one of the rule's primary rationales is the need "to deter police" from unconstitutional conduct. The Court then based its decision on the inevitable-discovery exception largely on its consideration of whether the deterrence rationale would be served by exclusion. *See id.* at 444.[7]

Finally, the government's argument (Br. 40-41, 43) that it is desirable for the police to obtain and use fruits of Sixth Amendment violations, as long as *Miranda* warnings intervene, again improperly conflates the values underlying the Fifth and Sixth Amendments. The admission of an "uncoerced confession[]" (*id.* at 43) may be desirable when the only potential objection is grounded in the Fifth Amendment. But the Sixth Amendment regularly precludes the

---

[7] Contrary to the government's suggestion (Br. 41), *Massiah* does not hold that police officers are free to deliberately elicit post-indictment statements from uncounseled defendants so long as the evidence is not used at trial. The Court rejected that reading of its *Massiah* decision in *Arizona* v. *Roberson*, 486 U.S. 675 (1988), where it described the relevant passage from *Massiah* as holding only "that the continuing investigation of *uncharged offenses* did not violate the defendant's Sixth Amendment right to the assistance of counsel." *Id.* at 685 (emphasis added). The Court similarly explained in *Moulton*, 474 U.S. at 179-80, that "[t]he police have an interest in the thorough investigation of crimes for which formal charges have already been filed. . . . In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused." *See also Cobb*, 532 U.S. at 170-71.

admission of voluntarily-made, incriminating statements. *See, e.g., Massiah*, 377 U.S. at 201-03, 206. When the government exploits a confrontation with an uncounseled defendant to obtain evidence, the use of that evidence against the defendant undermines the values of the Sixth Amendment and the integrity of any trial at which the evidence is admitted. The assistance of counsel guaranteed by the Sixth Amendment is thus "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

III. The Government Cannot Sustain Its Burden To Prove Attenuation Of The Taint.

Properly applied, this Court's traditional derivative-evidence rule requires the exclusion of petitioner's jailhouse confession from his trial. The government argues (Br. 43-48) that the "courteous" nature of the officers' encounter with petitioner at his home and the fact that they did nothing to overbear his will during that visit should render the subsequent jailhouse confession admissible. Once again, the government's focus on Fifth Amendment principles of voluntariness is misplaced. The Court has repeatedly rejected similar arguments, which "betray[] a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in *Brown*." *Dunaway*, 442 U.S. at 219; *see also Taylor* v. *Alabama*, 457 U.S. 687, 693 (1982).

In fact, the taint from the officers' violation of the Sixth Amendment was never purged in this case. It was not dissipated by the passage of only thirty minutes between petitioner's two confessions, during which the officers maintained custody of petitioner. Such a short time could not "possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691.[8] Nor was there "any

[8] The government's reliance on *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), is misplaced. The Court concluded there that the forty-five-minute period between the illegal restraint and the defendant's confession did not justify suppression of the confession because the Fourth Amendment violation involved no "strict[] . . . custodial conditions." *Id.* at 107. Moreover, the post-*Miranda* confession in *Rawlings* was a "spontaneous reaction[]" to the discovery of incriminating evidence—unlike this case, where the second confession clearly resulted from police questioning. *Id.* at 108. Finally, *Rawlings* also was based on the officers' good-faith belief that they had complied with the Constitution. *See id.* at 109-10. As we explain below, that premise is absent here.

meaningful intervening event" that might justify the conclusion that the Sixth Amendment taint of the first confession had been effectively dissipated. *Kaupp*, 123 S. Ct. at 1848 (internal quotation marks omitted). In particular, no steps were taken to ensure that petitioner understood the true consequences of a decision to further incriminate himself at the jailhouse, after having made a first inadmissible confession at his home.

The "purpose and flagrancy of the [officers'] misconduct" (*Brown*, 422 U.S. at 604) at petitioners' home further supports suppression of his jailhouse confession. The officers' deliberate effort to engage petitioner in conversation on the charges in the pending indictment was a patent violation of the Sixth Amendment.[9] This case presents no difficult issues of Sixth Amendment law that the officers can be excused for having misunderstood and, in any event, the officers never claimed to have believed that they were complying with the Sixth Amendment. Their conduct was a clear violation of *Massiah* and should not be rewarded.

The link between the first and second confessions is unmistakable. In the first statement, the officers elicited admissions on three subjects that they subsequently reviewed (and re-elicited) at the station house: that petitioner previously had been a user of methamphetamine; that he had (during the same period) associated with the persons alleged to have been his co-conspirators; and that he had (again dur-

[9] The government's contention (Br. 45) that the officers were merely negligent in choosing the wrong word (discuss) to convey their purpose is refuted by the magistrate's findings of historical fact. *See supra*, pp. 2-4.

ing the same period) been subject to a number of personal and financial problems. *See* J.A. 18, 21, 29-33, 35-36, 46-48, 51-52, 73, 79-80, 87, 89.

The officers then followed textbook policy (literally) in exploiting those admissions to obtain a more elaborated confession at the jailhouse. It would have been entirely reasonable for a nonlawyer such as petitioner to have thought that, because he had already admitted to the police that he was a methamphetamine user and that he had associated with the alleged co-conspirators during the time of the alleged conspiracy, it was incumbent upon him to respond to the officers' jailhouse questions asking for additional details. A lawyer, of course, could have advised petitioner that the initial statement could be suppressed and that it might well be to his advantage to remain silent. The government in this case exploited its advantage over an uncounseled defendant lacking legal knowledge and skill. That is exactly what the Sixth Amendment is intended to prevent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
NOAH A. LEVINE
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

OCTOBER 2003